Filed 10/6/10 P. v. Miller CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE, Plaintiff and Respondent, v. RUSSELL WADE MILLER, Defendant and Appellant.	C061194 (Super. Ct. No. CM029221)

A jury convicted defendant Russell Miller of driving under the influence of alcohol (Veh. Code, § 23152, subd. (a)[1] [the "generic DUI" conviction]) and with a blood-alcohol level of greater than 0.08 percent (*id.*, subd. (b) [the "per se DUI" conviction]),[2] and the misdemeanor of failing to stop after involvement in an accident that resulted in property damage.

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[1] Hereafter, undesignated statutory references are to the Vehicle Code.

[2] We make use of the shorthand terms employed in *People v. McNeal* (2009) 46 Cal.4th 1183, 1187.

Before trial, defendant had admitted a prior felony generic DUI conviction. The trial court sentenced defendant to state prison (staying execution of sentence on the generic DUI conviction).

On appeal, defendant argues that the trial court erred in excluding defense evidence of habit. He also asserts that he cannot be *convicted* of both driving offenses. We deem defendant to have raised the additional issue (without further briefing) of whether the January 2010 amendments to Penal Code section 4019 apply to his pending appeal and entitle him to presentence conduct credits at a higher rate. We shall affirm the judgment as modified.

FACTS

When the bartender at The Bungalow bar in Gridley arrived for work, defendant was already present. She had been working there a month and was familiar with him, because he drank there on both days of her weekend evening shift. She served him a pint glass of beer, and then cut him off because he was showing signs of inebriation. He left about 7:00 p.m. with a man the bartender knew as Gus. Gus had earlier left the bar and returned with a short Hispanic male with whom the bartender was not familiar. She could not remember if defendant was wearing a hat, and did not think Gus was wearing one. The bartender saw Gus on one other occasion after that evening.

A neighbor of defendant was returning to her home on their narrow country road at about 8:30 p.m. When she reached a stop sign, she saw an oncoming pickup truck driving down the middle of the road. She could see two men with cowboy hats in the

truck. As she headed forward, she first steered onto the dirt shoulder to make room and then swerved perpendicularly off the road, but the truck still managed to sideswipe her car as it passed. It continued down the road without stopping, so she decided to pursue it.

She followed it back down the road past the stop sign, south of which it turned into the driveway of a home. She pulled into the driveway behind the truck. The two men got out of the truck. She called out to them about hitting her car. The driver approached and pointed his finger at her, telling her that she had hit his truck. The accident victim at this point decided to call 911. The two men walked into the house. The driver was defendant, with whom she was not previously familiar. The passenger was an older male, whom she thought she had seen on previous occasions feeding the horses on the property when she drove by. She identified defendant's father in court as the passenger. Neither of the occupants of the truck were Hispanic. She did not see any other vehicle drive away from the residence.

While the accident victim waited, a woman came out of the house and suggested they deal with the matter in the morning. The accident victim rejected the suggestion, and the woman went back inside. The police arrived about 30 to 45 minutes later. When the police came out of the house with defendant, who had changed clothes, the accident victim identified him as the driver, pointing out the ring on his forehead from the cowboy hat.

At first, defendant denied being aware of a collision and

said his friend Gustavo had borrowed the truck. He then told the police that he had been home from The Bungalow for a few hours and had not driven home, which people at The Bungalow would corroborate. He asserted the accident had been the fault of the accident victim, and would not assist the police in locating Gustavo. Defendant was extremely inebriated and barely able to walk. (A later blood test indicated a blood-alcohol level of 0.29 percent.) The keys to the truck were in defendant's pants pocket. Defendant would not explain how the keys had come to be in his possession.

Contrary to her trial testimony, the accident victim told the police at the time that she had seen the passenger walk around the side of the house off into the dark, and had never told them at any point that the passenger was defendant's father. The police did not find Gustavo on the property. Defendant's parents asserted that they did not know anything about the events of the evening other than defendant having been out with an unknown friend and returning home. The police could not find an address for Gustavo.

Defendant's father told the police (and testified) that he had been at home with his wife when defendant returned home with an unknown friend. Defendant told his parents that the friend had brought him home. The father had seen a vehicle belonging to Gus in the driveway while defendant was out. It was gone by the time the police arrived. Defendant's mother testified that defendant had gone out with Gus, who was driving defendant's truck. Gus left his vehicle in the driveway over by the barn.

She had seen the truck return; Gus got out of the driver's side. It took Gus a few minutes to walk the distance over to his own vehicle. He got in and drove off.

DISCUSSION

I

Before trial, the prosecutor sought to exclude defense evidence from two Bungalow bartenders and defendant's parents that defendant had the habit of having other people drive when he was drinking (Gus in particular). Defense counsel asserted this was proper habit evidence. The prosecutor riposted that he would then be entitled to introduce evidence of defendant's prior driving convictions (which antedated 2002). The court initially signaled its belief that both types of evidence were admissible, but reserved its ruling.

The parties revisited the issue toward the end of the prosecution's case. Defense counsel made an offer of proof that the Bungalow bartenders would testify that either they had given defendant a ride home or he had sought out rides from others (leaving his truck in the parking lot) on "numerous occasions." His parents would corroborate the habit. The court ruled that this offer of proof was insufficient to transform character evidence into evidence of habit. The defense could still ask questions about his reputation for having others drive him, but that would entitle the prosecution to ask the witnesses about their knowledge of whether defendant had driven under the influence.

Defendant contends this ruling was an abuse of the trial

court's discretion in determining the admissibility of habit evidence. (*People v. Hughes* (2002) 27 Cal.4th 287, 337.) He argues that he presented a sufficient number of instances to establish habit rather than mere propensity, and the evidence of his repeated convictions for driving under the influence before 2002 was too stale with regard to any habit at the time of the accident.

To this end, he relies on the circumstances of *People v. Bennett* (1969) 276 Cal.App.2d 172. However, we must review a trial court's ruling in light of the specific facts in the record before us, and therefore it is generally unproductive to compare the circumstances of different cases on a question of fact such as this. (*People v. Rundle* (2008) 43 Cal.4th 76, 137-138, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *Robison v. City of Manteca* (2000) 78 Cal.App.4th 452, 458, fn. 5; *State Compensation Ins. Fund v. Brown* (1995) 32 Cal.App.4th 188, 202.)[3]

Evidence of habit, which is repeated instances of identical responses to a specific situation, is admissible to prove that conduct on a particular occasion was consistent with the habit. (2 Jefferson, Cal. Evidence Benchbook (4th ed. 2009), *op. cit. supra,* §§ 35.61, 35.64; Evid. Code, § 1105.) There must be an

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[3] We note also that an earlier version of a prominent evidence treatise specifically criticized this holding. (2 Jefferson, Cal. Evidence Benchbook (Cont.Ed.Bar 2d ed. 1982) Character, Habit, and Custom, § 33.8, p. 1269; see 2 Jefferson, Cal. Evidence Benchbook (Cont.Ed.Bar 4th ed. 2009) § 35.65 [making same point without mentioning case by name].)

adequate sample of uniform responses, although specific standards for determining adequacy do not exist. (2 Jefferson, *op. cit. supra*, § 35.65.) The 1982 edition of Jefferson noted the distinction between a daily rider of a bus testifying that the driver "habitually" failed to observe a stop sign (which establishes habit), as opposed to testimony of observations only on "many occasions" (which is inadequate to *establish* a habit, though adequate to *rebut* a proffered habit). (2 Jefferson, Cal. Evidence Benchbook (2d ed. 1982), *op. cit. supra*, § 33.8, pp. 1270-1271.) A trial court's discretion is thus exercised somewhere between the boundaries of a "semiautomatic" response (the possibly extreme standard that appears in McCormick's evidence treatise (cited in *Webb v. Van Noort* (1966) 239 Cal.App.2d 472, 478)), and nine incidents involving patients out of 45,000 examinations (*Bowen v. Ryan* (2008) 163 Cal.App.4th 916, 926).

Defendant contends the trial court erred in its reference to defendant's driving offenses (dating back seven years and more) as undermining his showing of habit. We need not decide that question because the court was correct that the offer of proof was too inadequate (even without considering the offenses) to establish sufficient regularity of the practice of getting rides in comparison with the number of occasions on which defendant was drinking (even if we limit consideration to The Bungalow). We thus do not find any abuse of discretion in the ruling.

II

Citing cases in which the courts concluded that a defendant could not be convicted under multiple subdivisions of a statute for a single act (*People v. Craig* (1941) 17 Cal.2d 453 (*Craig*) [forcible rape and statutory rape]; *People v. Ryan* (2006) 138 Cal.App.4th 360 [forging names on different checks from same account to buy items at different stores]),[4] defendant argues that the Legislature did not intend to allow convictions under both subdivisions of section 23152. He asserts decisions to the contrary are dicta or disregard the binding authority of what he terms "the *Craig* analysis."

Burg v. Municipal Court (1983) 35 Cal.3d 257 (*Burg*) held that section 23152, subdivision (b) was not unconstitutionally vague. (*Burg, supra,* at pp. 272-273.) In the course of discussing the widespread adoption of statutes establishing the offense of per se DUI, *Berg* noted that various states either created an alternative definition for a DUI or created a new offense, and declared that California had taken the latter approach. (*Id*. at pp. 264-265.) On this point, *Berg* cited our decision in *Wallace v. Municipal Court* (1983) 140 Cal.App.3d 100, 108-109 (*Wallace*), which had in fact decided the issue in concluding the Legislature had created a new offense because the elements of proof were distinct (and therefore untimely prosecution of a generic DUI charge did not bar

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[4] He also cites a pleading case involving murder, which is not apposite. (*People v. Hawthorne* (2009) 46 Cal.4th 67, 89.)

prosecution as a per se DUI for the same act). (*Burg, supra,* at p. 265.)

Wilkoff v. Superior Court (1985) 38 Cal.3d 345, 348-349 (*Wilkoff*), involving the parallel provisions of section 23153 (where injury or death result), reaffirmed the rule that a single violation of that statute occurs regardless of the number of deaths or injuries that result, noting in passing that a count under *each* subdivision would be proper without considering the issue expressly. More recently, *People v. McNeal* (2009) 46 Cal.4th 1183, involving the elements of a generic DUI case under section 23152, also noted in passing that it is permissible to charge a defendant under both of the subdivisions because the Legislature had created a new crime. (*People v. McNeal, supra,* at pp. 1189, 1193.)

People v. Subramani (1985) 173 Cal.App.3d 1106, 1111 (*Subramani*), and *People v. Duarte* (1984) 161 Cal.App.3d 438, 446 (*Duarte*), decided the express issue defendant now raises. Both courts concluded that a defendant can incur convictions under both subdivisions of sections 23153 and 23152 (respectively), citing *Berg*.[5]

We agree that *Berg*, *Wilkoff*, and *McNeal* are dicta on the

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[5] We note that in the quarter century since the rendering of *Wallace*, *Duarte*, and *Subramani*, there have not been any cases criticizing their holdings. Indeed, to the extent there is any significance in the fact, the Supreme Court depublished a case a year before *Subramani* reaching the opposite result. (*People v. Cosko* (Feb. 21, 1984) Cr. 43877, opn. ordered nonpub. May 3, 1984.)

issue. We disagree with defendant, however, that *Wallace* (which provided the analytic underpinning for *Berg*, on which *Subramani* and *Duarte* rest) is inconsistent with *Craig*. However the *Craig* analysis may have phrased its reasoning, the question ultimately was one of legislative intent. "'[T]he true construction of section 261 [is] that thereby *the [L]egislature meant* merely to put beyond doubt the rule that on an information for rape the things mentioned in the subdivisions could be proven, and would establish the crime. It is not intended to . . . create six different kinds of crime.'" (*Craig, supra,* 17 Cal.2d at pp. 455-456, italics added.) Its discussion of there being only a "single outrage" that results in a single offense stems from finding support for its interpretation of the statute in Penal Code section 263, which states the "essential guilt of rape" lies in "the outrage to the person and feelings of the victim" (so any degree of penetration is sufficient). (Accord, *Craig, supra,* at p. 455.) *Craig* does not purport to establish an "outrage" bright line for divining legislative intent in all cases. *Wallace* also was concerned with divining the intent of the Legislature from the manner in which the elements of the two subdivisions were structured, coming to the conclusion that they were separate crimes because the essence of their elements were different. (*Wallace, supra,* 140 Cal.App.3d at pp. 107-108.) That *Wallace* did not talk in terms of "the *Craig* analysis" does not mean it did not properly approach the task of deciding whether the Legislature intended separate crimes.

We therefore adhere to *Duarte* (and the analogous cases of

Subramani and *Wallace*). Defendant was consequently properly *convicted* for both generic and per se DUI, and properly *punished* only for one conviction.

III

This court's miscellaneous order No. 2010-002 (filed March 16, 2010) deems defendant to have raised the issue (without further briefing) of whether January 2010 amendments to Penal Code section 4019 apply retroactively to his pending appeal and entitle him to additional presentence credits. We conclude the amendments apply to all appeals pending at the time of their enactment. (See *In re Estrada* (1965) 63 Cal.2d 740, 745 [amendments lessening punishment for crime apply to acts committed before passage, provided judgment is not final]; *People v. Hunter* (1977) 68 Cal.App.3d 389, 393 [applying *Estrada* to amendment involving custody credits]; *People v. Doganiere* (1978) 86 Cal.App.3d 237 [same].) Defendant is not among the prisoners excepted from the additional accrual of credit. (Pen. Code, § 4019, subds. (b)(2) & (c)(2); Pen. Code, § 2933.1.) Consequently, defendant having served 187 days of presentence custody, is entitled to 186 days of conduct credits. (Pen. Code, § 4019, subds. (b)(1), (c)(1) & (f).) We will modify the judgment and direct the trial court to amend the abstract of judgment accordingly.

DISPOSITION

The judgment is modified to award defendant 186 days of presentence conduct credits. As modified, the judgment is affirmed. The trial court shall prepare an amended abstract of

judgment and forward it to the Department of Corrections and Rehabilitation.

CANTIL-SAKAUYE, J.

We concur:

SCOTLAND, Acting P. J.*

BUTZ, J.

* Retired Presiding Justice of the Court of Appeal, Third Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.